

Letter of Findings Number: 04-20140061
Use Tax
For Tax Years 2010-12

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE

I. Use Tax—Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-9-1; Medco Health Solutions, Inc. v. Indiana Dept. of State Revenue, 9 N.E.3d 263 (Ind. Tax Ct. 2014); [45 IAC 2.2-3-12](#); Sales Tax Information Bulletin 60 (April 2011).

STATEMENT OF FACTS

Taxpayer is an Indiana business that contracts to provide and install cabinets, countertops, and other items in new construction and remodeling. The Department of Revenue ("Department") conducted a sales and use tax audit for the years 2010, 2011, and 2012. The audit resulted in a tax assessment. Taxpayer protested the imposition of use tax on select machinery. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented below.

I. Use Tax—Imposition.

DISCUSSION

At the outset, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). The Department also notes the following: sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

And use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Additionally, IC § 6-2.5-3-4 states:

- (a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:
 - (1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or
 - (2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of [IC 6-2.5-5](#), except [IC 6-2.5-5-24](#)(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.
- (b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

The Audit Report states that Taxpayer "contracts with hotels and motels to provide and install cabinets, marble countertops, desks, tile, millwork, and other items in both new construction and remodeling." Per the Audit Report, Taxpayer "invoiced jobs as lump sum contracts." The audit assessed use tax on various capital assets. As will be

seen below, Taxpayer protests the proposed assessment of use tax on planers, vacuum press, vertical panel saw, and Delta shaper. The items assessed by the Auditor were assessed pursuant to [45 IAC 2.2-3-12](#), which states:

- (a) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.
- (b) In order to be exempt on such purchases, the contractor must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.
- (c) Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.
- (d) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchaser [sic.] price of all material so used.
- (e) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.
(Emphasis added).

Taxpayer, in turn, argues that it is a "manufacturing contractor" that "manufactures and installs custom wood products." Taxpayer cites to Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA, and [45 IAC 2.2-5-8](#), in support of its argument (Note: information bulletins are "intended to provide nontechnical assistance to the general public."). The former, in particular, prefigures in Taxpayer's argument. Taxpayer argues that since the bulletin has a section regarding a "Manufacturing Contractor," if a contractor meets that "definition" then that contractor can avail itself of the manufacturing exemptions (hence Taxpayer's citation to and reliance on [45 IAC 2.2-5-8](#)). Thus the first, and crucial question, is regarding Taxpayer's interpretation of the bulletin. Sales Tax Information Bulletin 60 states in relevant part:

MANUFACTURER CONTRACTORS

Tangible personal property manufactured, fabricated, or assembled inside or outside Indiana is subject to use tax if the property is used, stored, consumed, or distributed in the state.

When operating pursuant to a lump sum contract, a manufacturer contractor shall pay sales tax on the cost of the raw materials at the time of purchase or use tax on the cost of the raw materials when the materials are converted into a new component for construction into real property. When operating pursuant to a time and material contract, a manufacturer contractor may purchase the raw materials exempt for resale by submitting a properly completed ST-105 General Sales Tax Exemption Certificate to the retailer. Note: when a manufacturer contractor purchases pre-fabricated materials for conversion into real property, the manufacturer contractor must pay sales tax on the entire retail unitary transaction, including any labor charges associated with the fabrication of the materials.

That language, which again is simply non-technical language for guidance, does not state that the equipment is exempt, nor does it state that a lump sum contractor can avail itself of the manufacturing exemptions. The bulletin is silent on the issue, but even if it were not, the disclaimer at the top of the bulletin states: "Information in the bulletin that is inconsistent with any law, regulation, or court decision is not binding on either the Department or the taxpayer." (Emphasis added). Also, the bulletin does state that "pursuant to a lump sum contract, a manufacturer contractor shall pay sales tax on the cost of the raw materials" (Since tax is due on the raw materials in a lump sum contract scenario, then by extension tax would also be owed on the equipment that works on the taxable raw materials). But parsing the bulletin aside, under the relevant regulation (i.e., [45 IAC 2.2-3-12\(c\)](#)) Taxpayer is required to pay sales tax on the purchase of equipment (or use tax if the equipment was purchased without sales tax having been properly paid). The Audit Report correctly assessed tax pursuant to [45 IAC 2.2-3-12\(c\)](#). Taxpayer's protest of this issue is denied.

Taxpayer, in the alternative, argues that for a thickness planer it has an invoice that shows sales tax was paid. However, Taxpayer sent to the Department a copy of a written proposal. The written proposal does not establish that tax was actually paid—the amount of the item, the applicable tax, are not on it. Instead, two items are listed (a jointer and a thickness planer), with the following:

WE PROPOSE hereby to furnish material and labor—complete in accordance with above specifications, for the sum of:

Handwritten, on the "Payment to be made as follows" line, is: "Payment in full including tax" and the handwritten amount of "\$7,200." As noted, Taxpayer bears the burden of proof. Taxpayer has not met its burden under IC § 6-8.1-5-1(c). Taxpayer's protest is thus denied.

Finally, the Department notes that Taxpayer also included in its protest an argument about a refund of sales tax purportedly erroneously paid by Taxpayer. In order for issues involving a refund claim to be addressed, a taxpayer must first file a timely claim for refund with the Department. IC § 6-8.1-9-1 states in pertinent part:

(a) If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

(1) The due date of the return.

(2) The date of payment.

(Emphasis added).

The Indiana Tax Court has also provided guidance on the Department's ability to review claims for refund. In *Medco Health Solutions, Inc. v. Indiana Dept. of State Revenue*, 9 N.E.3d 263, 266 (Ind. Tax Ct. 2014), the Tax Court stated that:

The Department has no legal method of generating a claim for refund on its own; rather, a claim for refund can only be initiated by a taxpayer pursuant to the procedure set forth in Indiana Code § 6-8.1-9-1.

Thus, a taxpayer must file a claim for refund with the Department; the Department cannot create a claim for refund on Taxpayer's behalf. Taxpayer has not established that it has in fact filed a refund claim with the Department. Thus Taxpayer's argument regarding the purported overpayment is not addressed in this finding since Taxpayer has not established that it filed a claim for refund for the items.

FINDING

Taxpayer's protest is denied.

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